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Class Counsel

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

STEVE TOKOSHIMA, LUIS FLORES, and
JAMES FABER, on Behalf of Themselves and All
Others Similarly Situated,

Plaintiffs,

vs.

THE PEP BOYS - MANNY MOE & JACK OF
CALIFORNIA, a California Corporation; THE PEP
BOYS - MANNY MOE & JACK, a Pennsylvania
Corporation; and DOES 1-10,

Defendants.

CASE NO. C 12-4810 CRB

**PLAINTIFFS' NOTICE OF MOTION
AND MOTION FOR FINAL APPROVAL
OF CLASS ACTION SETTLEMENT AND
APPROVAL OF CLASS
REPRESENTATIVE SERVICE
PAYMENTS**

Date: January 9, 2015

Time: 10:00 a.m.

Ctrm: 6

Judge: Hon. Charles R. Breyer

**NOTICE OF MOTION AND MOTION FOR FINAL APPROVAL OF CLASS ACTION
SETTLEMENT AND APPROVAL OF CLASS REPRESENTATIVE SERVICE PAYMENTS**

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on January 9, 2015 at 10:00 a.m., pursuant to this Court's September 26, 2014 Order Granting Preliminary Approval of Class Action Settlement (Dkt. 73), in the courtroom of the Honorable Charles R. Breyer, Courtroom 6, 450 Golden Gate Avenue, San Francisco, CA 94102, Plaintiffs will and hereby do move this Court under Fed. R. Civ. P. 23(e) for final approval of the Settlement in this class action, and for approval of class representative service payments in the amount of \$10,000 each for named plaintiffs Steve Tokoshima and James Faber, and \$7,500 for named plaintiff Luis Flores.

This motion is made on the grounds that the Settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). The Settlement was reached after extensive investigation and discovery; substantial litigation, including this Court's certification of plaintiffs' minimum wage and related wage claims as a class action; and mediation followed by several months of arms-length settlement negotiations. The Settlement results in a \$3.6 million non-reversionary settlement fund, and will provide substantial recoveries to approximately 1,490 Class Members. The requested class representative service payments are fair and reasonable in comparison to the overall settlement and individual recoveries, and in light of the effort expended by the class representatives on behalf of the Class and similar awards approved by the federal district courts.

The motion is based on this Notice, the attached Memorandum of Points and Authorities, the accompanying declarations of Eve H. Cervantez, Matthew J. Matern, and Jarrod Salinas, the Court's file in this action, and such argument as may be heard by the Court.

Dated: December 1, 2014

By: /s/ Eileen B. Goldsmith
Eileen B. Goldsmith

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SUMMARY OF ARGUMENT

The \$3.6 million, non-reversionary Settlement should be approved because it is “fair, reasonable, and adequate.” Fed. R. Civ. P. 23(e)(2). The gross settlement fund exceeds Defendants’ exposure on the core minimum wage claims in this case. The Settlement will provide payments to approximately 1,490 Class Members, who will automatically be mailed individually calculated payments without having to submit a claim form. The Settlement is an outstanding result that provides for substantial individual Class Member recoveries while avoiding the risk and delay inherent in further litigation. No Class Member has objected to the Settlement or opted out.

All of the relevant considerations support approval of the Settlement. *See Churchill Vill. L.L.C. v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004). Balancing the strength of Plaintiffs’ claims against the risks of the litigation and the risk of being unable to maintain the case as a class action through trial, the Settlement should be approved. Plaintiffs’ minimum wage and derivative claims are certified as a class action, but their tools claim is not. Dkt. 65. Although Plaintiffs believe the wage claims are strong on the merits especially in light of the published California Court of Appeal decision in *Gonzalez v. Downtown LA Motors*, 215 Cal.App.4th 36 (2013), Pep Boys has asserted substantial defenses on both factual and legal grounds. There are also significant challenges of proof with respect to the amount of non-productive time worked by Class Members. Pep Boys also stated its intent to move to decertify the wage class before trial. To prevail on the tools claim on a class basis, plaintiffs would first have to successfully appeal the denial of class certification as to that claim.

In addition, the amount offered in Settlement is fair, reasonable, and adequate. Based on preliminary estimates, the amount available for Class Member settlement payments is approximately \$2,348,500. Settlement Payments will be individually calculated based on subclass membership and eligible workweeks in a covered class position. Members of the Mechanic Subclass will recover an estimated \$2,245 per year working in a covered position, and members of the Base Pay Subclass will recover an estimated \$1,122 per year working in a covered position. The Settlement Payments are weighted to account for the likely larger individual recoveries for Mechanic Subclass members had Plaintiffs prevailed at trial on their legal theories.

Moreover, the Settlement was only reached after extensive investigation and formal and informal discovery, as well as a fully litigated motion for class certification. The Settlement was reached after mediation with the assistance of an experienced mediator, followed by several months of arms-length settlement discussions. Class Counsel, who are highly experienced class action lawyers, strongly support the Settlement. Their views were informed by their extensive investigation and research, as well as the Court's ruling on class certification. Class Members strongly support the Settlement as well.

Although the analysis of *In re Bluetooth Headsets Prods. Liab. Litig.*, 654 F.3d 935, 946 (9th Cir. 2011), does not apply here because this settlement was reached only after class certification rather than before certification, the Settlement also passes muster under *Bluetooth*. Under the Settlement, Class Counsel will receive an award of attorneys' fees only if the Court approves the entire Settlement amount as fair and reasonable to the Class. Any amount of the requested fee that the Court does not award will not revert to Defendants, but will be added to the amount available for Class Member settlement payments. The amount of the Settlement allocated to attorneys' fees is not disproportionate. Thirty percent of the Settlement is allocated to attorneys' fees. That amount is fully justified by the risks of the litigation and the results obtained, is in line with fee awards in comparable cases under recent decisions, and is significantly less than Class Counsel's actual lodestar. *See* Pls' Motion for Attorneys' Fees and Expenses, filed today.

Finally, the Court should approve the requested class representative service payments of \$10,000 each for named plaintiffs Steve Tokoshima and James Faber (both of whom were deposed), and \$7,500 for Luis Flores (who was not deposed). Each plaintiff performed substantial work on behalf of the Class, and undertook significant personal financial and reputational risk, as is detailed in their declarations in support of preliminary approval. *See* Dkt. 72-5, 72-6, 72-7. The amounts requested are commensurate with the work they performed, and are consistent with recent service payment awards. *See Rodriguez v. West Publishing Corp.*, 563 F.3d 948, 958-59 (9th Cir. 2009); *Ramirez v. Ghilotti Bros. Inc.*, Case No. C 12-04590 CRB, 2014 WL 1607448 at *2 (N.D. Cal. Apr. 21, 2014) (approving service payments of \$15,000 each to three class representatives from \$950,000 settlement fund); and cases cited *infra* at 14-15.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs have settled this class action with Pep Boys, securing a \$3.6 million, non-reversionary settlement that will benefit approximately 1,490 former Pep Boys employees, who will receive, on average, approximately \$2,245 (for mechanics) or \$1,122 (for ESTs) for each year they worked at Pep Boys. The settlement resolves claims that Pep Boys failed to comply with California minimum wage law (and related derivative claims) and failed to reimburse its mechanics and technicians for tools that, plaintiffs allege, employees had no choice but to supply themselves in order to do their jobs. The gross settlement fund actually exceeds the value of Plaintiffs' core minimum wage claims. The Settlement provides substantial recoveries now for workers of relatively modest means – without any claims process – and is an extraordinary result in light of the significant risks inherent in further litigation.

The Settlement should be approved because it is “fair, reasonable, and adequate.” Fed. R. Civ. P. 23(e)(2). The Settlement was reached only after substantial investigation and formal and informal discovery, the Court’s certification of the minimum wage and derivative claims as a class action (Dkt. 65), and mediation with the assistance of a highly experienced and respected mediator followed by arms-length settlement negotiations over a period of several months. The Class has received notice of the Settlement, and no one has objected or opted out. The Court should therefore grant final approval.

II. CASE BACKGROUND

A. Summary of the Lawsuit and Procedural History

1. Overview

In this class action, plaintiffs Steve Tokoshima, James Faber, and Luis Flores alleged that Pep Boys violated California law by failing to compensate them and the Settlement Class in accordance with state minimum wage law, and by failing to reimburse them for tools that employees needed to do their work and were forced to supply themselves. The Class consists of Pep Boys mechanics (the Mechanic Subclass), as well as lower-skilled automotive technicians in several classifications (known as “ESTs”) and commercial sales managers whose base hourly rate

1 of pay was less than \$8.00 per hour (referred to collectively in the Settlement as the “Base Pay
 2 Subclass”). *See* Dkt. 65 at 7 (Order re Motion for Class Certification and Motion to Strike, April
 3 28, 2014). The Class is limited to employees in the covered classifications who worked for Pep
 4 Boys in California between August 6, 2008 and September 30, 2011, and whose employment with
 5 Pep Boys terminated on or before September 30, 2011. *Id.* at 6.

6 The operative Second Amended Complaint (Dkt. 36) alleges nine causes of action under
 7 California law: 1) violation of California minimum wage law (Labor Code §§1182.12, 1197); 2)
 8 miscalculation of overtime wages paid (Labor Code §510); 3) failure to provide accurate itemized
 9 wage statements under Labor Code §226; 4) miscalculation of premiums for missed meal breaks
 10 under Labor Code §226.7; 5) waiting time penalties under Labor Code §§201, 202, 203 & 204; 6)
 11 violation of Labor Code §2802 by failing to reimburse mechanics and ESTs for tools reasonably
 12 and necessarily supplied by the employees to perform their work; 7) unfair and unlawful business
 13 practices under Bus. & Prof. Code §17200; 8) PAGA penalties; and 9) failure to pay employees for
 14 rest breaks, pursuant to IWC Wage Order No. 4, §12(A), and *Bluford v. Safeway Stores, Inc.*, 216
 15 Cal.App.4th 864, 872 (2013). Pep Boys denies liability, and disputes plaintiffs’ theories on
 16 important points of law and fact. Settlement Agreement, Dkt. 72-2 (“Settlement”), ¶I.

17 2. Procedural History

18 Before filing the complaint, plaintiffs’ counsel engaged in a substantial investigation over
 19 several months, interviewing numerous current and former Pep Boys employees, reviewing
 20 documents relating to their employment, and researching the potential claims in the case.
 21 Cervantez Decl. ¶5. Plaintiffs filed the original complaint as a class and representative action in
 22 Alameda County Superior Court on August 6, 2012. Pep Boys timely removed the action to this
 23 Court under the Class Action Fairness Act, 28 U.S.C. §1332(d). *See* Dkt. 1.

24 In the initial case management conference, this Court authorized the parties to engage in
 25 discovery pertaining to class certification. Dkt. 14. Pursuant to this direction, the parties
 26 conducted extensive and thorough formal discovery. Although discovery was initially limited to
 27 that necessary for class certification, the parties exchanged approximately 2,000 pages of
 28 documents, and propounded and responded to written interrogatories and requests for admission.

1 Plaintiffs took two 30(b)(6) depositions of Pep Boys' corporate designees, and later deposed one of
 2 those designees a second time. Defendants deposed named plaintiffs Tokoshima and Faber, and
 3 Gerald Rosenbluth, an automotive expert retained by plaintiffs to provide opinions regarding the
 4 need for Class Member mechanics and ESTs to supply their own tools to do their work. Plaintiffs
 5 also deposed three service managers who provided declarations on behalf of Pep Boys. Through
 6 this formal discovery and informal investigation, together with further informal discovery and
 7 investigation in advance of mediation on July 24, 2013 (*see infra* at 3-4), Class Counsel was able to
 8 obtain a full understanding of the value of the claims and the risks of the litigation. Cervantez
 9 Decl. ¶7.

10 The parties first agreed to mediate this case before briefing class certification, with the
 11 assistance of Mark S. Rudy, a well-regarded mediator with extensive experience litigating and
 12 mediating wage-and-hour class actions. Because the parties were unable to resolve this case at the
 13 July 24, 2013 mediation, they resumed active litigation. Cervantez Decl. ¶9. At that time,
 14 plaintiffs amended the complaint to add a claim for failure to pay employees for rest breaks, based
 15 on the California Court of Appeal's published decision in *Bluford*. Dkt. 36.

16 In November 2013, Plaintiffs moved for class certification of the minimum wage and
 17 derivative wage and penalty claims, and the tools claim. Following full briefing, oral argument,
 18 and further supplemental briefing, the Court issued its order on April 28, 2014, certifying the wage
 19 claims and denying certification of the tools claim. Dkt. 65.

20 3. Mediation and Settlement Discussions

21 Before the mediation, Pep Boys provided payroll data and contact information for a sample
 22 of employees within the proposed class definition. Plaintiffs' Counsel retained a damages expert to
 23 provide detailed damages calculations for the minimum wage and derivative wage claims.
 24 Plaintiffs' Counsel also interviewed approximately 50 Class Members on the contact list provided
 25 by Pep Boys. In the days before the mediation, the parties exchanged thorough mediation briefs,
 26 including detailed, claim-specific analyses of Pep Boys' potential financial exposure. Plaintiffs'
 27 Counsel also supplied several declarations from Class Members who were interviewed. Cervantez
 28 Decl. ¶11.

1 The parties met for an all-day mediation with Mr. Rudy's assistance on July 24, 2013.
 2 Although the parties did not reach agreement that day, they continued to communicate over the
 3 following months through Mr. Rudy regarding settlement. Class Counsel continued to analyze the
 4 strengths and weaknesses of plaintiffs' legal claims, including arguments raised by Pep Boys at the
 5 mediation and in the class certification briefing, and Pep Boys' analysis of its exposure. Following
 6 this Court's April 28, 2014 order certifying the wage claims and denying certification of the tools
 7 claims, the parties exchanged further detailed memoranda through Mr. Rudy setting forth their
 8 respective settlement positions. Mr. Rudy then made a mediator's proposal, which both parties
 9 accepted on June 2, 2014. Cervantez Decl. ¶12.

10 Following the parties' acceptance of the mediator's proposal, counsel for the parties
 11 continued to negotiate the details of the Settlement Agreement and the Class Notice over the next
 12 two months. The proposed settlement was negotiated in good faith and at arms' length. The
 13 parties vigorously pressed their positions throughout. The settlement creates a \$3.6 million, non-
 14 reversionary common fund on behalf of approximately 1,490 Pep Boys employees. Cervantez
 15 Decl. ¶13; *see infra* Section III.

16 **B. Notice to the Class and Class Member Response to the Settlement**

17 The Court granted preliminary approval of the Settlement on September 26, 2014 and
 18 ordered notice to be distributed to the Class. Dkt. 73. The Court-approved Notice of Settlement
 19 was mailed to all 1490 Class Members at their last-known addresses (as updated through the US
 20 Postal Service National Change of Address database) on October 16, 2014. Salinas Decl. ¶9. The
 21 Settlement Administrator, Simpluris Inc., forwarded the Notice to any Class Member whose Notice
 22 was returned by the Postal Service with a forwarding address. *Id.* ¶10. Simpluris has skip-traced
 23 all Class Members whose notices were returned as undeliverable without forwarding addresses to
 24 date, and remailed the Notice to any Class Member for whom skip-tracing revealed a more recent
 25 address. Out of 1,490 notices mailed, only 37 are undeliverable. *Id.* ¶11. The Notice provided that
 26 the deadline for opting out or objecting to the Settlement is December 15, 2014. Salinas Decl. Exh.
 27 A; Dkt. 72-3 at 8-9 ¶¶14-15. At the time of filing, no Class Members had opted out or objected.
 28 Salinas Decl. ¶12. Accordingly, it appears that Class Members overwhelmingly support the

Settlement.¹

III. SETTLEMENT TERMS

The principal terms of the Settlement Agreement are discussed in detail in Plaintiffs' motion for preliminary approval. Dkt. 72 at 4-9. We summarize the key provisions here.

The \$3.6 million, non-reversionary settlement fund is allocated as follows: (1) Class Member settlement payments; (2) \$5,000 to the Labor & Workforce Development Agency ("LWDA") for PAGA penalties; (3) up to \$1,080,000 for attorneys' fees; (4) up to \$100,000 in litigation expenses²; (5) up to \$39,000 in settlement administration costs; and (6) \$27,500 for class representative service payments (\$10,000 each for plaintiffs Tokoshima and Faber, and \$7,500 for plaintiff Flores). Settlement ¶V.2.1. Any amounts allocated to attorneys' fees and expenses, administrative costs, or class representative service payments that are not awarded as set forth in the Settlement will be added to the amount available for Class Member settlement payments. Settlement ¶¶V.1.27, V.1.39, V.8.1, V.10.2.³ In addition to the \$3.6 million settlement amount, Pep Boys will pay the employer's share of payroll taxes on that portion of the initial distribution of settlement payments that is allocated to wages. Settlement ¶V.1.27. At this time, the estimated amount of the settlement fund allocated to Class Member settlement payments is \$2,348,500.

The Settlement will provide substantial recoveries for all Class Members who can be located. Each such Class Member will be mailed a settlement check, without having to submit a claim form. Settlement payments will be calculated based on the number of workweeks in the class period during which the Class Member worked in a covered position. Settlement ¶¶V.8.2-V.8.3. Based on preliminary estimates, Mechanic Subclass members will receive approximately \$43.18 per eligible workweek (or \$2,245 per year for a full year in a class position within the class

¹ Plaintiffs will submit an updated declaration from the Settlement Administrator in advance of the January 9, 2015 final fairness hearing.

² None of the \$3.6 million settlement amount will revert to Pep Boys except the settlement payment shares of any Class Member who opts out of the settlement. Settlement ¶¶V.8.3, V.8.12. To date, no one has opted out.

³ As set forth in plaintiffs' Motion for Attorneys' Fees and Expenses filed today, Class Counsel request an award of \$97,207.56 for litigation expenses.

1 period), and Base Pay Subclass members will receive approximately \$21.59 per workweek (\$1,122
 2 per year).⁴ The gross settlement amount is actually more than the value of the core minimum wage
 3 claims. Dkt. 72-1 ¶28.

4 The settlement payments are weighted based on the relative recoveries Class Members
 5 would have obtained had they prevailed at trial under plaintiffs' theories in this litigation.
 6 Plaintiffs' minimum wage and derivative claims are based on the theory that Pep Boys' pay plans
 7 failed to compensate Class Members at no less than the California minimum wage for that time
 8 when employees were on the clock, but were not performing work for which they could earn piece
 9 rate pay or commissions. Plaintiffs contended that ESTs and CSMs – the Base Pay Subclass –
 10 earned a base hourly wage rate for all hours, and thus received some compensation for their non-
 11 productive time, while members of the Mechanic Subclass did not receive any compensation for
 12 their non-productive time. Under plaintiffs' theories, mechanics also incurred higher reimbursable
 13 tools expenses than ESTs. Therefore, the plan of allocation provides that Mechanic Subclass
 14 members receive twice as much per workweek as Base Pay Subclass members.

15 After the initial distribution of settlement payments to all Class Members who have been
 16 located during the notice process, Class Members will have up to 90 days to cash their settlement
 17 checks. Any amounts that remain uncashed after this first distribution will be available for
 18 redistribution. If the amount available for redistribution exceeds \$75,000, the amount exceeding
 19 \$75,000 will be available for a second distribution to Class Members who cashed their initial
 20 settlement checks, while \$75,000 will be distributed to the *cy pres* recipient. Settlement ¶¶V.8.4-
 21 V.8.10. If the amount available for redistribution does not exceed \$75,000, that entire amount will
 22 be distributed to the *cy pres* recipient.

23 The *cy pres* recipient is the National Automotive Technicians Education Foundation
 24 ("NATEF"). Settlement ¶V.8.11. NATEF is an appropriate *cy pres* beneficiary in light of the
 25 objectives of this litigation and the interests of the absent Class Members. *See Dennis v. Kellogg*

26 ⁴ Base Pay Subclass members will receive settlement payments only for those workweeks in which
 27 their base hourly rate of pay was less than the then-applicable California minimum wage of \$8.00
 28 per hour. Settlement ¶V.1.19.

1 Co., 697 F.3d 858, 865-66 (9th Cir. 2012). NATEF is a not-for-profit organization that strives to
 2 improve the quality of automotive technician training programs, and acts in the interest of all
 3 automotive workers by helping to train the next generation of skilled technicians. Dkt. 72-1 ¶30.

4 Upon the Settlement's effective date, all Settlement Class Members who have not validly
 5 opted out will be deemed to have released Pep Boys and all related entities from all claims that
 6 were or could have been asserted based on the facts and allegations in the Second Amended
 7 Complaint. Settlement ¶V.1.38.

8 **IV. THE COURT SHOULD GRANT FINAL APPROVAL OF THE SETTLEMENT**

9 The law favors settlement, particularly in class actions and other complex cases where
 10 substantial resources can be conserved by avoiding the time, cost, and rigors of formal litigation.
 11 *Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 950 (9th Cir. 1976). Final approval of a proposed
 12 class action settlement should be granted where it is established that the proposed settlement is
 13 "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). In determining whether to grant final
 14 approval, the Court does not "reach any ultimate conclusions on the contested issues of fact and
 15 law which underlie the merits of the dispute, for it is the very uncertainty of outcome in litigation
 16 and avoidance of wasteful and expensive litigation that induce consensual settlements." *Class*
 17 *Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1291 (9th Cir. 1992) (quoting *Officers for Justice v.*
 18 *Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982).) "[U]nless the settlement is clearly
 19 inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with
 20 uncertain results." *Nat'l Rural Telecomm. v. DirecTV, Inc.*, 221 F.R.D. 523, 526. (C.D. Cal.
 21 2004).

22 In ruling on final approval, the Court should consider the following factors:

23 (1) the strength of plaintiff's case; (2) the risk, expense, complexity, and likely
 24 duration of further litigation; (3) the risk of maintaining class action status
 25 throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery
 26 completed and the stage of the proceedings; (6) the experience and views of
 counsel; (7) the presence of a governmental participant; and (8) the reaction of the
 Class Members to the proposed settlement.

27 *Churchill Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004).

28 The relative importance of any particular factor will depend upon the nature of the claims,

the types of relief sought, and the facts and circumstances presented by the individual case. *Class Plaintiffs*, 955 F.2d at 1291. Furthermore, “this list of factors is not exclusive and the court may balance and weigh different factors.” *Vasquez v. Coast Valley Roofing, Inc.*, 266 F.R.D. 482, 488 (E.D. Cal. 2010) (citing *Torrissi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1376 (9th Cir. 1983)).

As explained below, the relevant factors support granting final approval to this Settlement.

A. The Strength of Plaintiffs’ Claims, Balanced Against the Risks and Complexity Involved, and the Risk of Maintaining Class Action Status Through Trial, Strongly Supports Approval of the Settlement.

Balancing the strengths of plaintiffs’ case against the “risk, expense, complexity, and likely duration of further litigation” and the “risk of maintaining class action status throughout the trial,” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998), the settlement is clearly in the Class’ best interest.

Plaintiffs sought classwide relief on both their minimum wage and derivative claims, and on the tools claim. Although plaintiffs believed that both the wage and tools claims were strong, and could be pursued on a class action basis, the Court certified only the wage claims. Dkt. 65. The declaration of Eileen B. Goldsmith in support of preliminary approval discusses in detail the potential challenges faced by plaintiffs in obtaining classwide relief on the merits of the wage and tools claims. Dkt. 72-1 ¶27.

Although plaintiffs believe they have a strong case on the merits of the wage claims, particularly following the published Court of Appeal decision in *Gonzalez v. Downtown LA Motors*, 215 Cal.App.4th 36 (2013), Pep Boys has disputed many issues of fact and law, and contends that the pay plans at issue in this case are distinguishable from those held unlawful in *Gonzalez*. Dkt. 72-1 ¶27.d. Moreover, plaintiffs face potential challenges of proof regarding the amount of non-productive time worked by Class Members. *Id.* ¶27.a. There remain numerous contested questions of fact and law with respect to the wage and derivative claims, particularly with respect to liquidated damages and certain Labor Code penalties, as to which Plaintiffs’ must prove Pep Boys’ state of mind. *Id.* ¶27.e. Because this Court declined to certify the tools claim, plaintiffs could not obtain classwide relief on that claim without first successfully appealing the

1 denial of certification and then prevailing on the merits. Plaintiffs also face substantial challenges
2 of classwide proof on the tools claim. Dkt. 72-1 ¶27.c. In light of these challenges to obtaining
3 classwide relief, Class Counsel determined that settlement was highly beneficial to the Class.

4 In addition to these considerations creating litigation risk, plaintiffs face further risk to
5 obtaining a classwide recovery due to the rapidly evolving law applicable to the minimum wage
6 and rest break claims. Plaintiffs premised the minimum wage claims on the California Court of
7 Appeal's published decision in *Armenta v. Osmose, Inc.*, 135 Cal.App.4th 314 (2005), holding that
8 an employer must pay its employees no less than the minimum wage for each hour worked (rather
9 than, as federal law permits, determining whether the employer has complied with minimum wage
10 obligations by averaging all compensation earned by the employee over all hours worked). At the
11 time that plaintiffs filed the original complaint, no published California Court of Appeal decision
12 addressed *Armenta*'s application to piece rate workers like the auto mechanics and ESTs in this
13 case, and *Gonzalez v. Downtown LA Motors*, a case that squarely presented that question, was
14 pending in the Court of Appeal. Dkt. 72-1 ¶8. As discussed in plaintiffs' Motion for Attorneys'
15 Fees and Expenses filed today, plaintiffs' counsel filed an amicus brief in *Gonzalez* in an effort to
16 protect the interests of the putative class here, and the Court of Appeal eventually issued a
17 published opinion in *Gonzalez* on April 2, 2013 – several months into this litigation – applying
18 *Armenta*'s holding to piece rate auto mechanics. While *Gonzalez* significantly strengthened
19 plaintiffs' minimum wage claims (especially after the California Supreme Court denied review),
20 another Court of Appeal might reach a contrary result thereby triggering renewed attention in the
21 Supreme Court. Cervantez Decl. ¶18. Similarly, Plaintiffs' rest break claim is largely dependent
22 on the Court of Appeal's published decision in *Bluford*. Although the California Supreme Court
23 denied review of *Bluford* as well, another Court of Appeal might reach a conflicting result. *Id.* ¶19.

24 Also, there is considerable risk that plaintiffs would not be able to maintain class action
25 status through trial. Even after the Court certified plaintiffs' minimum wage and derivative claims
26 as a class action, Pep Boys contended it still had grounds to move to decertify those claims before
27 trial. Moreover, the Court declined to certify the tools claims. To obtain classwide relief on those
28 claims, plaintiffs would have to wait until the final resolution of the minimum wage claims in this

1 Court, then appeal the denial of certification of the tools claims – and only if plaintiffs then
 2 prevailed on appeal could they pursue the tools claims on a class basis. Therefore, the likelihood at
 3 this point of obtaining classwide relief on the tools claim is low. The chance that plaintiffs might
 4 not be able to obtain any classwide relief underscores the benefits to the Class of the Settlement.

5 The Settlement’s structure is designed to account for this assessment of the relative
 6 strengths of plaintiffs’ various claims and the likelihood of obtaining classwide relief on the merits
 7 as against the risk of losing on the merits. The tools claims are discounted heavily to account for
 8 the high litigation risk, the likelihood of extended delay in obtaining any relief, and challenges of
 9 proof even if plaintiffs could prevail on appeal from the denial of class certification. The minimum
 10 wage claims are less heavily discounted, to account for the strength of those claims in the wake of
 11 *Gonzalez*. Nevertheless, a significant discount was appropriate to reflect challenges of proof, and
 12 many unresolved questions of law that could impact the size of the overall recovery.

13 The timing of the settlement is also highly beneficial to Class Members. If the case is not
 14 settled now, it will almost certainly be some years before Class Members obtain any relief, during
 15 which time more Class Members may move and not be located later to receive their share.

16 Given the risks presented by this litigation, including the risk of outright loss on liability or
 17 damages and the risk of appealing the denial of certification of the tools claim, and the likelihood
 18 of extensive further delays if active litigation continues, the Settlement is fundamentally fair and is
 19 in the best interest of the Class.

20 **B. The Extent of Discovery and the Stage of the Proceedings Show That Class**
 21 **Counsel Was Fully Informed of the Strengths and Weaknesses of the Case and**
 22 **the Relative Benefits of the Settlement.**

23 “A settlement following sufficient discovery and genuine arms-length negotiation is
 24 presumed fair.” *Vasquez*, 266 F.R.D. at 489. The extent of discovery and investigation here
 25 enabled Class Counsel to develop an informed view of the strengths and weaknesses of the case.
 26 The parties engaged in extensive discovery regarding Pep Boys’ relevant policies and practices, as
 27 set forth *supra* at 2-3. The decision to settle was informed not only by the extent of discovery and
 28 investigation, but also by this Court’s ruling on class certification and the parties’ exchange of

1 information before and after their July 24, 2013 mediation. Class Counsel's extensive and
 2 thorough investigation of the strengths and weaknesses of plaintiffs' claims and the range of
 3 potential recoveries, and the advanced stage of the litigation weigh strongly in favor of settlement.

4 **C. The \$3.6 Million Non-Reversionary Settlement Amount is Fair and**
 5 **Reasonable.**

6 The \$3.6 million offered in settlement is substantial, and fair and adequate to the class. As
 7 discussed in plaintiffs' motion for preliminary approval, the allocation of the gross settlement fund
 8 – including the amounts earmarked for the LWDA payment, class representative service payments,
 9 administrative costs, and attorneys' fees and expenses – is reasonable. Dkt. 72 at 5-8 and 10-14.
 10 Assuming the Court approves the requested class representative service payments, attorneys' fees
 11 and costs, administrative costs, and \$5,000 payment to the LWDA, approximately \$2,348,500 will
 12 be available for settlement payments to Class Members. That entire amount will be distributed to
 13 as many of the 1,490 Class Members as can be located during the notice process and who have not
 14 opted out. Settlement ¶V.8.3(b). For purposes of rough calculation, this would result in an
 15 *average* payment of \$1,576.17 to each of the 1,490 Class Members. However, as discussed above,
 16 the payments are weighted based on subclass membership and are individually calculated based on
 17 eligible workweeks when each Class Member worked in a covered position. Settlement ¶¶V.8.2 &
 18 V.8.3(a).

19 Given the substantial risks of continuing with the litigation, the overall amount offered, and
 20 in particular the amount available for Class Member settlement payments, is reasonable. Although
 21 plaintiffs estimated Pep Boys' maximum exposure on the minimum wage and related claims,
 22 including penalties and interest, at approximately \$20 million, Pep Boys' estimated exposure
 23 numbers at mediation were considerably lower. Dkt. 72 at 10-11. Moreover, even though the
 24 Court certified the wage claims as a class action, there is substantial risk that plaintiffs might not
 25 prevail on the merits, or that even if they prevailed, they might be unable to prove an entitlement to
 26 liquidated damages or other Labor Code penalties that require rulings on Pep Boys' state of mind.
 27 *See* Labor Code §§203, 1194.2; Dkt. 72 at 11. Because the Court declined to certify the tools claim
 28 as a class action, the likelihood of a classwide recovery on that claim is quite remote absent

1 settlement, requiring plaintiffs to successfully appeal the denial of certification and then prevail on
 2 the merits on remand. Dkt. 72 at 11. For these reasons, the \$3.6 million offered in settlement is an
 3 excellent result that will bring substantial benefits to the Class.

4 **D. The Experience and Views of Class Counsel Strongly Support Approval.**

5 “Great weight is accorded to the recommendation of counsel, who are most closely
 6 acquainted with the facts of the underlying litigation.” *Nat’l Rural Telecomm.*, 221 F.R.D. at 528.
 7 “The fact that experienced counsel involved in the case approved the settlement after hard-fought
 8 negotiations is entitled to considerable weight.” *Ellis v. Naval Air Rework Facility*, 87 F.R.D. 15,
 9 18 (N.D. Cal. 1980). The Settlement has the strong support of Class Counsel, whose views are
 10 informed by their extensive experience. As set forth in the declarations of Eve Cervantez and Matt
 11 Matern, Class Counsel are highly experienced class action lawyers who are well positioned to
 12 assess the risks of continued litigation and the benefits obtained by the Settlement. Cervantez
 13 Decl. ¶¶24-30; Dkt. 39 ¶¶3-13, Dkt. 72-4 ¶3. As described above, substantial investigation,
 14 discovery, and litigation over the past three years has enabled Class Counsel to fully assess the
 15 strengths and weaknesses of the case. Class Counsel believe that the Settlement is an excellent
 16 result that is in the best interest of Class Members in light of all of the known facts and
 17 circumstances, including the Court’s class certification ruling, the risks of obtaining classwide
 18 relief on the merits, and the likelihood of further significant delay attendant to resuming active
 19 litigation. Dkt. 72-1 ¶¶23-28, Dkt. 72-4 ¶3.

20 **E. Class Members Uniformly Support the Settlement.**

21 At the time of this filing, no Class Members had opted out or objected to the Settlement.
 22 The named plaintiffs also strongly support the Settlement. Dkt. 72-5 ¶5, 72-6 ¶5, 72-7 ¶5. The
 23 Class Members’ evident support of the Settlement weighs in favor of approval. Plaintiffs will
 24 address any further Class Member responses to the Settlement received after the date of this filing
 25 in their reply brief to be filed on December 22, 2014.

26 **F. The Bluetooth Factors Also Support Approval of the Settlement.**

27 In *In re Bluetooth Headsets Prods. Liab. Litig.*, 654 F.3d 935 (9th Cir. 2011), the Ninth
 28 Circuit identified additional factors that a court should consider in evaluating a class action

1 settlement that is entered into before a class is certified, to protect against collusion. *Id.* at 946
 2 (where a settlement agreement is “negotiated prior to formal class certification, consideration of
 3 [the] *Churchill* factors alone is not enough to survive appellate review”). Although no *Bluetooth* is
 4 required here because this Settlement was reached after this Court certified the minimum wage and
 5 derivative claims, the Settlement nevertheless satisfies the *Bluetooth* analysis as well.

6 Class Counsel will not recover their fees “separate and apart from class funds,” *Bluetooth*,
 7 654 F.3d at 947, but will only recover fees if the amount of the settlement fund is approved by the
 8 Court as fair and adequate. Settlement ¶¶V.2.1, V.10.1. Any amounts allocated by the settlement
 9 to fees that the Court declines to award will not revert to Pep Boys, as the *Bluetooth* court found
 10 might signal collusion (654 F.3d at 947), but instead will be added to the amount of the settlement
 11 fund that is distributed to Class Members. Settlement ¶V.10.2. Finally, Class Counsel is not
 12 receiving “a disproportionate distribution of the settlement” as compared to that received by Class
 13 Members. 654 F.3d at 947. Class Counsel are requesting a fee award of 30% of the Settlement
 14 Fund, or \$1,080,000. As discussed in detail in plaintiffs’ Motion for Attorneys’ Fees and
 15 Expenses, this amount is less than Class Counsel’s lodestar, is fully justified by the risks of the
 16 litigation and the results obtained, and is well in line with fee awards in comparable cases.
 17 Meanwhile, as discussed above, the 1,490 Class Members will receive individual distributions
 18 from the estimated net settlement fund of approximately \$2,348,500. All Class Members who can
 19 be located will receive substantial, individually calculated payments. Class Members will be
 20 mailed their payments automatically, and need not go through a claims process. Thus, the lion’s
 21 share of the \$3.6 million settlement fund will go directly to the Class.

22 **G. The Requested Service Payments are Reasonable.**

23 The Settlement Agreement provides for class representative service payments of \$10,000
 24 each for plaintiffs Tokoshima and Faber, and \$7,500 for plaintiff Flores (who was not deposed).
 25 These amounts are reasonable and should be approved.

26 Enhancement payments for class representatives are “fairly typical in class action cases,”
 27 and “are intended to compensate class representatives for work done on behalf of the class, to make
 28 up for financial or reputational risk undertaken in bringing the action and, sometimes, to recognize

1 their willingness to act as a private attorney general.” *Rodriguez v. West Publishing Corp.*, 563
 2 F.3d 948, 958-59 (9th Cir. 2009). Here, the three named plaintiffs were active participants in this
 3 litigation. Plaintiff Tokoshima spent at least 69 hours in direct work pertaining to this case,
 4 including extensive meetings and interviews with Class Counsel both before and after the case was
 5 filed to assist with counsel’s investigation of plaintiffs’ claims, gathering documents to aid in
 6 counsel’s fact development, responding to written discovery, preparing for his deposition and being
 7 deposed, and personally attending the July 2013 mediation. Dkt. 72-5 ¶2. Plaintiff Faber spent at
 8 least 59 hours in direct work on the case, including meetings and interviews with Class Counsel for
 9 fact development, responding to written discovery, and preparing for his deposition and being
 10 deposed. Dkt. 72-7 ¶2. Plaintiff Flores spent at least 37 hours on the case, including interviews
 11 and meetings with Class Counsel for investigation and fact development, and responding to written
 12 discovery. Although defendants ultimately decided not to depose Mr. Flores, they noticed his
 13 deposition and he was ready to be deposed. Dkt. 72-6 ¶2. Each of the named plaintiffs undertook
 14 financial and reputational risk in this litigation, including the risk of not being able to find other
 15 work in the automotive repair industry and the risk of having to pay Pep Boys’ litigation costs.
 16 Dkt. 72-5 ¶3, 72-6 ¶3, 72-7 ¶3. Moreover, whereas Class Members are releasing claims only with
 17 respect to claims alleged in the Second Amended Complaint (Settlement ¶V.1.38), the class
 18 representatives are giving Pep Boys broader general releases with respect to all claims they may
 19 have against Pep Boys. Settlement ¶V.1.14.

20 The amounts requested are reasonable, both in comparison to the overall settlement fund
 21 and in comparison to individual Class Member recoveries. *See Staton v. Boeing Co.*, 327 F.3d 938,
 22 976 (9th Cir. 2003). The total \$27,500 value of the three class representative enhancements
 23 amounts to just 0.7% of the total \$3.6 million settlement fund. Also, as discussed *supra* at 5-6,
 24 Class Member recoveries are currently estimated at approximately \$2,245 *per year* worked for
 25 Mechanic Subclass members and \$1,122 *per year* worked for Base Pay Subclass members.
 26 Moreover, the amounts requested are consistent with enhancement awards that district courts in
 27 California have typically approved in recent cases. *See, e.g., Ramirez v. Ghilotti Bros. Inc.*, Case
 28 No. C 12-04590 CRB, 2014 WL 1607448 at *2 (N.D. Cal. Apr. 21, 2014) (approving service

payments of \$15,000 each to three class representatives from \$950,000 settlement fund); *Greene v. Gino Morena Enters. Inc.*, 2014 WL 5606442 at *3 (C.D. Cal. Nov. 4, 2014) (approving two \$10,000 service payments from \$575,000 settlement fund); *Ontiveros v. Zamora*, 2014 WL 5035935 at *6 (E.D. Cal. Oct. 8, 2014) (approving \$15,000 service payment from \$2 million settlement fund in minimum wage class action); *Boring v. Bed Bath & Beyond*, Case No. C 12-05259 JST, 2014 WL 2967474 at *3 (N.D. Cal. June 30, 2014) (approving \$7,500 service payment from \$415,000 settlement fund); *Ross v. U.S. Bank NA*, Case C 07-02951 SI, 2010 WL 3833922 at *2 (N.D. Cal. Sept. 29, 2010) (approving four \$20,000 service payments from \$3.5 million settlement fund); *Bond v. Ferguson Enters., Inc.*, 2011 WL 2648879, at *2, 15 (E.D. Cal. June 30, 2011) (approving two \$11,250 incentive payments from \$2.25 million settlement fund). For these reasons, the Court should approve the class representative service payments.

V. CONCLUSION

For the reasons set forth above, Class Counsel respectfully request that the Court grant final approval of the Settlement and approve the class representative service payments in the amounts set forth above.

Dated: December 1, 2014

By: /s/ Eileen B. Goldsmith
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